No. 75-849

In the

Supreme Court of the United States

OCTOBER TERM, 1975

AAFCO HEATING AND AIR CONDITIONING CO.,

Petitioner,

vs.

NORTHWEST PUBLICATIONS, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT AND THE INDIANA COURT OF APPEALS, THIRD DIVISION

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JURISDICTION

Jurisdiction of this Court may not be invoked under 28 U.S.C. Section 1254(1), nor are the time factors upon which jurisdiction rests stated by Petitioner, pursuant to Rule 23 of this Court.

STATEMENT OF THE CASE

Petitioner has failed to comply with Rule 23(f) in that the Petition for Writ of Certiorari fails to specify the

stage in the proceedings in the Court of first instance and in the Appellate Court at which, and the manner in which, the federal questions sought to be reviewed were raised. Moreover, Petitioner has failed to specify the way in which they were passed upon by the Courts below, and has not supplied quotation to, or specific portions of, the record to indicate the places in the record where matter may be found which will show that the federal questions were timely and properly raised.

Pursuant to Rule 40 of this Court (made applicable by Rule 24), Respondent now corrects the statement of the case made by the Petitioner as to inaccuracies and omissions.

Respondent admits publishing the stories complained of, but the record does not indicate that Respondent intended to blame Petitioner in the public's eyes for the fire and resulting deaths.

Petitioner incorrectly states that Knightly, a reporter for Respondent, testified during discovery proceedings that he knew of no witnesses who claimed the defective furnace installation caused the fire. The reporter, Knightly, testified that he did know of persons who claimed that the furnace malfunctioned. He stated that it was a fire department official who claimed that the fire was due to an overloaded electrical circuit due to defective wiring because of the furnace installation. (R. 336; 2-21)

Furthermore, the record does not support Petitioner's allegation that Knightly *stated* that he was going to spread AAFCO all over the Gary papers. (R. 118-119)

Petitioner totally misstates the case as to Terence O'Rourke, the Managing Editor of the newspaper. The record demonstrates that Terence O'Rourke understood

the cause of the fire to be a circuit overload, and that the fire prevention officials of the City of Gary felt that installation of the heavy duty blower with the furnace was the probable cause of the overload by creating an overload of the circuit when the furnace kicked on. (R. 282-283)

The Petitioner did not have a building permit for the installation of the furnace in question (R. 65). Prior to that time, the City of Gary's inspectors had found the property not to be up to minimum code. (R. 315) Later, charges were filed against Petitioner in the Gary City Court (R. 65) and the Licensing Board for the Building Department of the City of Gary held a hearing concerning the job done by Petitioner without a permit (R. 205-207). Although the furnace itself was not blamed for the fire, according to fire officials the heavy duty blower on the furnace may have caused an overload in the electrical circuits. (R. 298; 336)

ARGUMENT

PETITIONER FAILS TO RAISE AND DEMONSTRATE IN ITS PETITION FOR CERTIORARI THAT THE COURT OF APPEALS DECIDED A FEDERAL QUESTION OF SUBSTANCE OR DECIDED AN ISSUE IN A MANNER CONTRARY TO DECISIONS OF THIS COURT.

Petitioner seeks to have this Court grant certiorari based on essentially the following points:

(I) When state public policy is declared by a Court rather than by the legislature, Petitioner is denied Fourteenth Amendment due process. (Pet. for Writ, P. 6)

(II) "The Constitution of the United States does not permit a state to provide to a publisher of defamatory falsehoods the defense of a federal constitutional privilege which has not been found to exist by this Court." (Pet. for Writ, P. 10)

(III) "The complaint of the petitioner in the trial court fully sets forth a cause of action which would withstand a Motion for Summary Judgment under the decision of this Court in *Gertz* v. *Robert Welch. Inc., supra*, and this case is particularly apt for review by this court to further delineate the extent to which a state may define for itself the appropriate standard of liability, and whether or not a constitutional privilege under the First Amendment may be attached by a state in a manner different from and inconsistent with the application of constitutional privilege by this Court.

I.

THE INDIANA COURT OF APPEALS, RATHER THAN THE INDIANA LEGISLATURE, HAS THE EXCLUSIVE POWER TO INTERPRET THE CONSTITUTION OF THE STATE OF INDIANA AND IN SO DOING DID NOT DENY PETITIONER ITS RIGHTS UNDER THE FOURTEENTH AMENDMENT.

The issue of violation of Petitioner's rights under the Fourteenth Amendment to the United States Constitution was not raised in the state court proceedings; nevertheless, if the issue had been raised it would have been of no merit.

It is well settled federal constitutional law that the Fourteenth Amendment leaves the states free to distribute the powers of government, as they will, between their legislative and judicial branches. *Dreyer* v. *Illinois*, (1902) 187 U.S. 7, 83-84; *Prentis* v. *Atlantic Coastline Company*, (1908) 211 U.S. 210. 225.

The fact that Indiana has declared its policy by decision of its Court of Appeals and by denial of transfer by the Supreme Court of Indiana rather than by legislative enactment can never deny the Petitioner its rights under the Fourteenth Amendment to the Constitution of the United States. *Hughes* v. *Superior Court of California*, (1950) 339 U.S. 460; *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Union Local 309* v. *Hanke*, (1950) 339 U.S. 470.

Moreover, the decision of the Indiana Courts in this case dealt exclusively with a state constitutional issue, the interpretation of Article I Section IX of the Indiana Constitution. It is the judicial branch of the Indiana State government rather than the legislative branch which is the guardian of the Constitution. The Courts have the exclusive responsibility and duty to interpret the Constitution

of the State of Indiana and to apply that interpretation to the case at issue. *State ex. rel. Mass Transportation Authority of Greater Indianapolis* v. *Indiana Revenue Board*, (1970) 146 Ind. App. 334, 255 N.E.2d 833.

A State Court does not infringe on Fourteenth Amendment rights if it erroneously interprets or applies the laws of its own state. *Howard* v. *Kentucky*, (1906) 200 U.S. 164.

The Petition for Writ of Certiorari fails to show that Petitioner raised, before the Indiana Court of Appeals and the Indiana Supreme Court, the constitutional issue of the violation of petitioner's rights under the Fourteenth Amendment to the Constitution of the United States. Petitioner in fact at no time raised this issue during the state court proceedings.

In its motion for rehearing filed in the Indiana Court of Appeals, the Petitioner contended as follows:

1. That the majority opinion erroneously held that there was no material issue of fact in the record.
2. That the opinion of the Court of Appeals failed to follow the law as adopted by the Indiana Supreme Court in various prior opinions.
3. That the majority opinion erroneously assumed and decided that Article 1, Section 9, of the Indiana Constitution protects false and libelous publication of fact relating to matters which are of general or public concern.
4. That the majority opinion decided that a private individual may not recover for negligently published false material.
5. That the majority opinion erroneously failed to apply the Indiana Rule relating to libel suits as stated in the above specification 2, after the recent U.S. Supreme Court case of *Gertz*, which expressly recognized the right of states to apply such a rule.

Also, Petitioner's petition to transfer to the Supreme Court of the State of Indiana set forth the same reasons for error and did not raise the issue of violation of the Fourteenth Amendment rights of the petitioner.

This Court, therefore, has no jurisdiction to consider the issue of a violation of rights under the Fourteenth Amendment to the United States Constitution. 28 U.S.C. §1257(3); S.Ct. Rule 23(f).

II.

THE INDIANA COURT OF APPEALS DID NOT PROVIDE A DEFENSE IN DEFAMATION ACTIONS BASED UPON A FEDERAL CONSTITUTIONAL PRIVILEGE BUT RATHER DERIVED SUCH DEFENSE FROM THE CONSTITUTION OF THE STATE OF INDIANA.

Petitioner seeks a writ of certiorari on the basis that the Indiana Court of Appeals interpreted the United States Constitution in a manner contrary to the decision of this Court in *Gertz* v. *Robert Welch, Inc.*, (1974) .....U.S....., 94 S.Ct. 2997.

The Indiana Court of Appeals' decision did not attempt to interpret the First Amendment to the United States Constitution, but, in fact, held that the qualified privilege, as set forth in that opinion, arose by reason of Article 1, Section 9 of the Indiana Constitution.

> "We first assume that the publication of matters which are of general or public concern is an activity protected by Article 1, Section 9 of the Indiana Constitution." 321 N.E.2d at 585-586.
>
> "Indiana's constitutional protection of freedom of expression requires that the interchange of ideas upon all matters of 'general or public interest' be unimpaired." 321 N.E.2d at 586.

> "We adopt a standard that requires the private individual who brings a libel action involving an event of general or public interest to prove that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard of whether it was false." 321 N.E.3d at 586.

Petitioner recognized this in its petitions for rehearing and for transfer. Futhermore, the dissenting opinion of Judge Garrard also recognized that the decision was an interpretation of the Indiana State Constitution. 321 N.E.2d at 593.

This case was the first opportunity presented to the Indiana Courts to define Indiana's Constitutional law on qualified privilege in light of *Gertz*. It is submitted that the Indiana Court of Appeals interpreted the Indiana State Constitution to protect freedom of speech to a greater extent than required by the decision of this court in *Gertz*.

Contrary to Petitioner's statements, the Indiana Court of Appeals decided Indiana constitutional law consistent with *Gertz*, which permitted the individual states to define for themselves the appropriate standard of liability for a publisher of defamatory falsehood injurious to a private individual. 418 U.S. 323.

Since this case concerns interpretation of the Constitution of the State of Indiana rather than the Constitution of the United States, and since that interpretation did not infringe on Federal Constitutional Rights, this court has no jurisdiction to consider the issues presented by Petitioner. 28 U.S.C. §1254-1257.

III.

CERTIORARI SHOULD NOT BE GRANTED SINCE RESPONDENT WAS ALSO ENTITLED TO THE PROTECTION OF FEDERAL CONSTITUTIONAL PRIVILEGE IN RESPECT TO PUBLICATION CONCERNING PUBLIC FIGURES AS SET FORTH BY THIS COURT IN GERTZ.

Respondent further respectfully requests that Certiorari be denied for the reason that the Plaintiff qualifies as a public figure based upon the record in this matter and, therefore, the constitutional malice test as set out in *New York Times* v. *Sullivan* (1964) 376 U.S. 254, is applicable to the Petitioner. Both Judge Staton's majority opinion and Judge Garrard's dissenting opinion, in the Indiana Court decision, agree that the materials presented to the trial court, for consideration upon the motion for summary judgment, were insufficient to establish a genuine issue of material fact upon the defense issue of constitutional malice, if the criteria in *New York Times* were applied.

Under the law as pronounced in *Gertz, supra,* if the Petitioner is either a "public official" or a "public figure" he still must meet the federal constitutional malice test of *New York Times.*

Respondent contends that the record supports only the conclusion that Petitioner is a "public figure". This being so, Petitioner would have to satisfy the *New York Times* malice test.

Gertz suggested that one can become a "public figure" either by seeking publicity for his activities or by voluntarily assuming a position in society where such publicity is to be expected (.....U.S. at .....; 94 S.Ct. at 3013), or by assuming one of the "roles of especial prominence in the affairs of society". (U.S. at .....; 94 S.Ct. at 3009).

The Indiana Court of Appeals adopted a test stating that when a publication concerning a private individual plaintiff involves a public issue, the actual malice test accommodates the interest of free speech and of compensation to injured individuals. The Indiana Court did not speak to the wholly private area where a negligence rule might be invoked. However, the result in the instant case is the same whether the Indiana "public issue" test is applied or whether the *Gertz* "public figure" test is applied.

In *Gertz,* Justice Powell, speaking for the majority, in looking for criteria for determining "public figure" states:

> It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Gertz* v. *Robert Welch, Inc.*, ...U.S. at ....., 94 S.Ct. at 3013.

Gertz, therefore, redefined the standard as to the "public figure" concept, pointing out that it includes two types of persons:

> 1. One who has pervasive fame or notoriety, in which case he is a "public figure for all purposes and contexts"; or
> 2. One who is thrust or drawn into the "vortex" of a public controversy, in which case he is a public figure for a limited range of issues."

Because of Petitioner's activities in the economic endeavors of selling and installing furnaces in Northwest Indiana; because it was required to hold a license from the City of Gary to make such installations; because of the necessity to obtain permits from the City of Gary to make the specific installation; and because of its installation of the furnace in a house which had been condemned by the municipal authorities as uninhabitable, the Petitioner could reasonably anticipate publicity and should, for that reason alone, fall within the constitutionally protected areas of "public figure".

The Petitioner voluntarily assumed a prominent role in its license revocation hearing, and, therefore, it could reasonably foresee the consequences of extensive publicity concerning its activities in the City of Gary. In other words, as Justice Powell phrased it: "Public figures necessarily 'invite attention and comment' ". (..... U.S. at .....; 94 S.Ct. at 3010).

Furthermore, *Gertz* indicates that those who occupy roles which in actual social practice invite increased attention will be classified as "public figures" for the purposes of defamation law". (88 Harv.L.Rev. at 143).

In *Greenbelt Cooperative Publishing Association, Inc.* v. *Bresler*, (1970) 398 U.S. 6, the local newspaper had reported that some people at a City Commission meeting thought that the position of the plaintiff, who was negotiating with city officials for a zoning variance for some of his property at the same time the city was attempting to buy from the plaintiff other of his property for a school site, amounted to blackmail. Noting that the plaintiff was a "public figure" due to his position in the community and his purposeful activity, this court held that plaintiff had to satisfy the *New York Times* standard. It is obvious that the Petitioner in this case stands in the same position as the property owner who wished the variance granted and was classified as a public figure in *Greenbelt*. Petitioner herein wished to retain its license in the City of Gary and actively sought and participated in a public revocation proceeding to obtain that result, thereby clearly becoming a "public figure".

The opinions and actions of corporations who hold economic power, obtain licenses to do business, participate in license hearings, and install furnaces in a condemned residence are commonly in the news and such corporations should be deemed public figures when involved in such matters of public concern.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that Petitioner's Petition for Certiorari be denied.

Respectfully submitted,

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